



The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor, Donald R. Kirk

Winter, 2002

President's Message

By Catherine Peek McEwen



Carpe diem – or life's just the trip

On November 10, 2002, a Sunday, many houses of worship across the nation heard the age-old message about never knowing when our day or hour will come. The proposition was dramatically and tragically illustrated by the death of our own Doug McClurg that very morning, probably around the time the ministers were delivering their sermons.

Doug's life exemplified the meaning of the message. He was always prepared, always gracious and thoughtful. His last weeks, days, and hours were no doubt spent with civility toward everyone he encountered. No one can say that Doug was anything but pleasant and professional to deal with — always. How many of us can honestly say likewise about ourselves? And no doubt Doug was diligent about showing those he cared for that he cared for them. Would our loved ones feel the same?

Doug's astonishing death gives us an opportunity to reflect upon what is and what is not important and productive in our lives as we near that uncertain day and hour. On a professional level, we can start with our attitude and style of dealing with others under tough circumstances. Are we gentlemanly, forthright, and calm (like Doug was); or do we elevate the end over the means at any cost? On a personal level, do we have balance in our lives, or will we be the one whose last words are "Gee, I wish I had more time at the office"?

Some people say life's too short. For those people, "carpe diem" is a philosophy that can help one be prepared for the day and the hour at any

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CM/ECF Updates

By Terry Miller, Chief Deputy

The next CM/ECF update and review will be held in conjunction with TBBBA's 27th Annual seminar and workshop. My presentation will be held on the afternoon of December 5. Among the topics will be information on our attorney training program and a live look at our CM/ECF database. I encourage all practitioners and their staffs to attend.

I am very pleased to announce that a new web page has been added to our internet site, www.flmb.uscourts.gov. On it you'll find information on this project, including system requirements (hardware & software), FAQ's, a project summary and status and a new training site. Unlike the training modules available on PACER's website, these tutorials are customized for our district to give users a better idea what our live system will look like. So, please check this new site out and let us know what you think. Responses can be made to:

webmaster@flmb.uscourts.gov.

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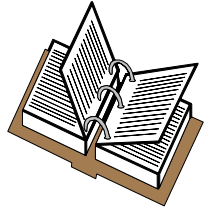
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CALENDAR OF EVENTS



EVENT

DATE

LOCATION

TBBBA Holiday Party	December 11, 2002	Tampa Club
TBBBA Lunch Program - "How To Preserve a Record on Appeal	January 14, 2003	Hyatt Hotel (downtown)
Florida Bar Midyear Meetings	January 15-18, 2003	Hyatt Regency, Miami
Florida Bar Business Law Section Bankruptcy/UCC Committee Meeting	January 16, 2003	Hyatt Regency, Miami
TBBBA Lunch Program - TBA	February 18, 2003	Hyatt Hotel (downtown)
TBBBA Lunch Program - Mediations	March 4, 2003	Hyatt Hotel (downtown)
National Conference of Bankruptcy Judges Mid-Year Meeting	March 9, 2003	San Francisco
TBBBA/Clerk's Half Day Seminar and Lunch	April 8, 2003	Hyatt Hotel (downtown)
Stetson University College of Law's Fourth International Bankruptcy Symposium	May 18-21, 2003	York, England

THE TAMPA BAY BANKRUPTCY BAR ASSOCIATION 2002-2003 Committee Chairs

The Association is looking for volunteers to assist us this coming 2002-2003 year. If you are interested in getting more involved with the Association or one of the Standing Committees, please contact any one of the Association officers or the Chairpersons listed below.

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VIEW FROM THE BENCH

PRELIMINARY INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS How to Get Them Effectively and Efficiently



By Honorable C. Timothy Corcoran, III

Attorneys are seeking temporary restraining orders and preliminary injunctions in numbers greater than ever these days it seems. Now may be a good time, therefore, to review some of the procedural basics of this aspect of bankruptcy practice.

Injunctions may only be sought in the bankruptcy court in the context of an adversary proceeding. F.R.B.P. 7001(7). The adversary complaint must contain some claim for relief that would entitle the plaintiff to an injunction.

Once the adversary proceeding is filed, Bankruptcy Rule 7065 applies. It makes applicable F.R.Civ.P. 65 with one minor — but important — exception. That exception eliminates Rule 65's requirement that security (or a bond) be posted as a condition of obtaining temporary or preliminary injunctive relief if the party seeking the relief is a debtor, trustee, or debtor in possession.

What Are They?

A preliminary injunction is an injunction that applies pending the determination of the adversary proceeding on its merits. In its stereotypical application, a preliminary injunction freezes the status quo until the court can rule on the merits of the underlying dispute framed in the adversary proceeding's pleadings. Often it is used to preserve the dispute for determination in circumstances in which a defendant's action would moot the dispute and render the court unable to act. For example, the court may consider preliminarily enjoining a defendant's disposition of property in circumstances in which the property is claimed by the trustee to be property of the bankruptcy estate and the defendant's transfer of the property to a buyer in a foreign country is imminent. The preliminary injunction would

preserve the status quo and keep the property within the jurisdiction of the bankruptcy court so the court can determine whether it is property of the estate. If it is ultimately determined to be estate property, it will still be around so the trustee can administer the property.

Under Rule 65, no preliminary injunction may be issued without notice to the adverse party. To cover those situations in which notice cannot be reasonably given, Rule 65 provides for temporary restraining orders (or TROs). A temporary restraining order is like a preliminary injunction but, if it is issued without notice to the adverse party, its duration is limited to ten days. Within that ten day period, the court must then conduct a hearing on notice to the adverse party of the plaintiff's motion for preliminary injunction. Thus, at that hearing, the TRO would dissolve and be replaced by a preliminary injunction — or not — as the court determines.

The interplay and relationship between preliminary injunctions and temporary restraining orders is also seen in the appellate rules. Preliminary injunctions entered by the district court have generally been appealable to the court of appeals just like final judgments. 28 U.S.C. § 1292. On the other hand, temporary restraining orders have generally not been appealable from the district court to the court of appeals because of their very short duration. See, e.g., 19 J. Moore, *Moore's Federal Practice* § 203.10[5](3d. ed. 2001). Under F.R.B.P. 8001 and 28 U.S.C. § 158, however, it appears that, with leave of the district court, appeals of both preliminary injunctions and temporary restraining orders may be taken from the bankruptcy court to the district court. As a practical matter, it would be difficult to prosecute an effective appeal from the bankruptcy court's TRO because of its

short duration and the fact that the bankruptcy court shortly will be conducting a hearing on notice to the adverse party of the plaintiff's motion for preliminary injunction.

With this general background, how does one obtain a TRO or a preliminary injunction?

Temporary Restraining Orders

To obtain a TRO, the adversary plaintiff files a motion for temporary restraining order separate from the adversary complaint itself. The plaintiff also files an independent motion for preliminary injunction. The motions should be supported by allegations of specific facts either stated in the verified complaint or supported by accompanying affidavits that demonstrate irreparable injury will occur absent the issuance of the TRO and that show the irreparable injury is so imminent that notice and a hearing on a motion for preliminary injunction is impractical if not impossible. In the motion or the supporting affidavits, counsel must also certify the efforts, if any, that have been made to give the opposing party notice of the relief sought and the reasons supporting the claim that notice should not be required.

The motions should describe precisely the conduct sought to be enjoined and set forth facts on which the court can make a reasoned determination as to the amount of security which must be posted if the movant is not a debtor, trustee, or debtor in possession.

The movant should file a supporting brief or legal memorandum. In the supporting brief, the plaintiff should address the following controlling issues: (1) the likelihood that the moving party will ultimately prevail on the merits of the claim; (2) the irreparable nature

(Continued on Page 5)

of the threatened injury and the reason that notice cannot be given; (3) the potential harm that might be caused to the opposing parties or others if the order is issued; and (4) the public interest, if any.

Counsel should also comply with L.B.R. 9004-2(d) governing requests for emergency or expedited treatment.

The movant should also submit a proposed form of temporary restraining order. The proposed TRO should set forth the reasons for its issuance, be specific in its terms, and describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.

Given the bankruptcy court's congested calendar and the emergency nature of the requested relief, the court typically must decide motions for TRO on the papers and without giving the moving party the opportunity for a hearing to develop the record. It is imperative, therefore, that counsel seeking a TRO make a complete record on the papers justifying the relief counsel requests. Counsel should be mindful that the court will be unfamiliar with the underlying dispute, its factual predicate, and the parties' positions. Counsel should, therefore, strive to set forth the facts in an organized, concise, and understandable manner. A mere chronological listing of historical events is usually unpersuasive without also providing some context.

If the court enters a TRO, the court will also schedule a hearing on the motion for preliminary injunction. If the court denies the TRO and the reason for the denial would not as a matter of law preclude the issuance of a preliminary injunction, the court will schedule for hearing the motion for preliminary injunction or otherwise determine how it will consider that motion. In either event, counsel for the plaintiff would then complete service of process and all papers and orders on the adverse party.

Preliminary Injunctions

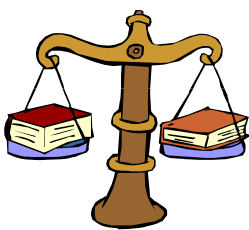
If counsel seeks a preliminary injunction with notice but does not seek a TRO without notice, counsel should nevertheless follow the steps described above for TROs with the exception of addressing the issue of why notice cannot be given. In the moving papers, as part of counsel's compliance with L.B.R. 9004-2(d), counsel should also inform the court of all facts necessary for the court to determine when a hearing should be scheduled, such as when the threatened harm is to occur.

Typically, any hearing the court conducts on a motion for preliminary injunction will be limited to oral argument. Counsel representing the opposing party, therefore, should file opposing affidavits no later than the day preceding the hearing, just as is done in summary judgment practice under Rule 56. If the papers and the hearing reveal a factual dispute requiring the taking of testimony and evidence, the court can direct the hearing accordingly. Opposing counsel should also file a brief or opposing legal memorandum. Depending upon the practice and preferences of the presiding judge, counsel will also want to ensure the judge has an opportunity to review the opposing brief before the hearing.

Conclusion

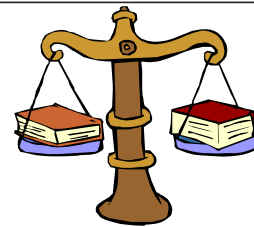
Preliminary injunctions and TROs are extraordinary remedies and are not routinely issued. When the facts warrant, however, they can be powerful tools to assist the parties, counsel, and the court in litigation. You will want to start your request for relief by reviewing the terms of the rules and complying strictly with them. When you have the right facts, packaging your requests for temporary and preliminary injunctive relief in the manner suggested here will maximize your chances of getting the relief you request in an efficient and effective manner.





CASE LAW UPDATE

By Adam Lawton Alpert



At a recent mentoring lunch, Judge Corcoran discussed a creditor's ability to recover post-petition fees incurred in the collection of a debt. Specifically, the Judge referred to one of his decisions relating to the jurisdiction of bankruptcy courts to deal with debts not included in a Chapter 13 plan, *In re Tomasevic*, 275 B.R. 86 (Bankr. M.D. Fla. 2001). The *Tomasevic* decision illustrates that a post-petition debt not dealt with by a confirmed Chapter 13 plan is outside the jurisdiction of the bankruptcy courts and remains enforceable under applicable nonbankruptcy law. See *Tomasevic*, 275 B.R. at 99. Attorney's fees could therefore be pursued outside of the Chapter 13 bankruptcy case.

In *Tomasevic*, Washington Mutual Bank ("Washington Mutual") held the first mortgage on the Chapter 13 debtor's residence. Washington Mutual filed a proof of claim for certain pre-petition arrears. In addition, because Washington Mutual was oversecured and the mortgage documents included a provision for Washington Mutual to recover attorney's fees and costs, Washington Mutual included pre-petition attorney's fees and costs in its claim. The Court confirmed the debtor's Chapter 13 plan providing for Washington Mutual's pre-petition claim to be cured over 36 months. After confirmation of the plan, the debtor objected to Washington Mutual's claim. Subsequently, Washington Mutual filed an amended claim to include certain post-petition attorney's fees and costs. The debtor then filed an amended objection objecting to both Washington Mutual's inclusion of post-petition fees and costs in its claim, as well as the validity and reasonableness of such fees and costs.

After overruling the portion of the debtor's objection relating to Washington Mutual's claim for pre-petition arrears, attorney's fees and costs, the Court turned to the portion of the debtor's objection relating to Washington Mutual's claim for post-petition attorney's fees and costs. Although the confirmation order provided that Washington Mutual's pre-petition arrearage claim was to be paid in full, it did not specifically provide for the payment of the post-petition attorney's fees or costs included in Washington Mutual's amended claim. The Court therefore sustained the debtor's objection to Washington Mutual's claim for post-petition attorney's fees and costs. As such, the post-petition attorney's fees and costs would not be included in the amounts to be paid to Washington Mutual under the debtor's confirmed Chapter 13 plan.

Although the court stated that Washington Mutual's claim for post-petition attorney's fees and costs would not be provided for under the debtor's Chapter 13 plan, the Court did not address the validity of Washington Mutual's

entitlement to such post-petition attorney's fees and costs or the reasonableness such amounts. Instead, the Court reasoned that post-petition claims not provided for within a confirmed Chapter 13 plan are "outside the scope of the bankruptcy court's jurisdiction." *Tomasevic*, 275 B.R. at 99 (citing *Telefair v. First Union Mtg. Corp.*, 216 F.3d 1333, 1339 (11th Cir. 2000)). In the order on the debtor's objection, the Court stated that:

Nothing in this order is intended to determine Washington Mutual's entitlement to its post-petition attorney's fees and costs or their reasonableness or amount. Subject only to the automatic stay, Washington Mutual may seek to recover its post-petition fees and costs directly from the debtor, outside the protection of the bankruptcy court and pursuant to non-bankruptcy law

Tomasevic, 275 B.R. at 99-100.

Thus, although Washington Mutual would not receive its post-petition attorney's fees and costs via the debtor's Chapter 13 plan payments, it remained free to collect these amounts outside of the bankruptcy proceeding. In fact, Washington Mutual could potentially recover its post-petition attorney's fees and costs more expeditiously outside of the bankruptcy case than if it had to participate in regular distributions through the debtor's Chapter 13 plan.



Association Honors Judge Paskay's Long Service to the Bar

In celebration of a milestone reached by Chief Judge Emeritus Alexander Paskay that we dare not mention specifically (but it has to do with an annual occurrence marking one's venture into the world), as well as for his being the attendee with the most View from the Bench seminar appearances, the Association donated \$500 to the Alexander L. Paskay scholarship fund at Stetson University College of Law. The gift was announced at the association's View from the Bench reception on November 6th, and Judge Paskay publicly thanked us all at the monthly lunch program in November.

CM/ECF Updates *(cont. from page 1)*

Lastly, speaking of system requirements let me summarize them here:

Attorneys will need the following hardware and software to electronically file, view, and retrieve documents in the electronic filing system.

- A personal computer (Pentium class recommended) running a standard platform such as Windows 95,98, 2000, Millennium, XP with at least 128 MB of RAM. Macintosh equivalents are also acceptable.
- Internet Service Provider with cable modem, DSL (Digital Subscriber Line), ISDN, T1. Dial-up modem access is not recommended because file upload time is much longer.
- Internet Explorer (IE) version 5.5 or newer. For those who prefer Netscape Navigator, only versions 4.6X or 4.7X work properly.
- Adobe Acrobat reader to read ECF documents or other PDF reader to read ECF documents.
- Adobe Acrobat writer or other PDF writer to convert documents from a word processor format to a portable document format. Adobe's website is:

www.adobe.com and their customer service number is 1-800-833-6687. (Earlier versions starting with 3.0 also work). The TBBBA is working on obtaining discounted licenses for its members.

- A PDF-compatible word processor like Macintosh or Windows-based versions of WordPerfect and Word.
- A scanner (also equipped with an automatic document feeder is recommended) to transmit documents that are not in your word processing system.

Interested in Public Speaking?

A joint effort by the Hillsborough County Bar Association and Chief Judge Manuel Menendez of the Thirteenth Judicial Circuit of the State of Florida has produced the Speaker's Bureau. The Speakers Bureau provides speakers to schools and civic organizations on law-related topics. If you would like to volunteer to speak on bankruptcy law issues, please call the HCBA's Melissa Fincher at 221-7777.



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President's Message (cont. from page 1)

given moment. Some people say life's too long, meaning we can either suffer a long, miserable and distress-inducing existence or enjoy a long, honorable and content existence. For those people, the theme "life's the trip and not the destination" — from Robert J. Hastings' piece "The Station" — reminds them that the day and the hour of arrival at the last station will certainly come some time, and the interim stops are not all that they seem. I can't say for sure whether Doug was a seize-the-day type or enjoy-the-trip-as-it-happens type, but knowing how prepared he was, probably both.

The scorched earth policy of the broken bench

My intelligent and inquisitive mother, Mom, saw the last edition of the Cramdown and wondered aloud about our logo, the broken bench. Good question, Mom, and it is fitting that it comes from someone with a 100% "off the boat" Italian heritage. It seems that the medieval forebears of those like the Sopranos and Corleones had a way — even back then — of emphatically conveying a message of discontent when their loans went unpaid: When a businessman did not pay his debts, it was the practice to destroy his trading bench. (Sleeping with the fishes came much, much later. Really, bankruptcy was punishable by the death penalty in old England.) Nowadays creditors are required to employ much more civilized ways of exacting justice for unpaid debts, although some creditors' counsel exhibit a "broken bench" attitude while doing so. To them, N.B.: (nota bene, also of Italian origin): See above re Doug. Incidentally, "broken bench" in Italian is "banco rotta." Say that three times fast with an Italian accent and see if that doesn't sound like the origination of the word "bankrupt." Some etymologists say it is.

Lucky 13's — ensuring plan completion, payment of fees, and eliminating stay relief litigation

Some of our association's members attended the 10th annual Bankruptcy Seminar sponsored by our colleagues who practice primarily in the Jacksonville Division, the Jacksonville Bankruptcy Bar Association. An eye-opening revelation of the day-long program was a combination of two local practices that ensure that Chapter 13's are virtually bulletproof. Consider this: Voluntary payroll deductions or direct bank account debits coupled with voluntary submission of post-petition mortgage or car loan payments through the Chapter 13 Plan. These voluntary practices maximize the prospect of plan completion (meaning payment of the debtor's counsel's fees!) as well as reduction of stay litigation and the liability it breeds for the creditor's

attorney's fees. Sure, maybe the Chapter 13 trustee makes a few more bucks, but this insurance seems worth it. And once out of Chapter 13, the debtor may choose to continue

making payments by payroll deduction or direct debit and avoid the temptation to spend the money for nonessentials — results that outlive the benefit of Chapter 13.

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Enforcement of a Federal Judgment

In re Premier Sports, 15 Fla. L. Weekly Fed. b250a

By: Carrie Beth Baris

Enforcement of a federal judgment can be confusing and even counterintuitive. In a recent opinion, Judge Alexander L. Paskay addressed the proper procedure to enforce a federal judgment entered in Florida against property located in another state. In *In re Premier Sports*, the Chapter 7 Trustee sued the defendant, an Illinois corporation, seeking money damages based on a breach of contract claim. The bankruptcy court entered a final judgment of default against the defendant in the amount of \$75,000.

Shortly after the entry of the final judgment, the Chapter 7 Trustee filed a motion for a writ of garnishment to be served on a bank in Chicago, Illinois. The bank responded to the writ stating that the defendant had a balance in its general checking account in the approximate amount of \$45,000. The defendant filed a motion to set aside the default but the bankruptcy court denied the request. At the same time, the defendant filed its motion to dissolve the writ of garnishment.

In its motion to dissolve the writ, the defendant argued that the writ was not served in compliance with the laws governing writs of garnishments in Illinois and therefore was not valid and not binding on the bank or the defendant. The Chapter 7 Trustee argued in response, that based on the clear language of Federal Rule of Civil Procedure 69, as incorporated in Federal Rule of Bankruptcy Procedure 7069, the proper procedure to enforce a judgment entered by the bankruptcy court is governed by the practice and procedure of the State of Florida and the writ, once issued, pursuant to that statute could be served nationwide by virtue of Federal Rule of Bankruptcy Procedure 7004(d).

According to the bankruptcy court, “[c]ontrary to the position taken by some courts, *see In re McAllister*, 216 B.R. 957 (Bankr. N.D. Ala. 1998), the initial inquiry of this Court is not a determination of the extent of the scope of the jurisdiction of the bankruptcy court or a determination of whether or not the procedure applied here is core or non-core pursuant to 28 U.S.C. §1334(b) and 11 U.S.C. §157.” The determination to be made is simply a determination of what the proper procedure is to enforce a Federal judgment entered in one state against property located out of the original state where the judgment was entered.

Federal Rule of Bankruptcy Procedure 7069(a) provides in part:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a

judgment . . . shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to what extent that it is applicable.

The record in the case did not provide any support for the contention that the writ was not issued in full compliance with the laws of the State of Florida governing writs. The bankruptcy court stated, “[i]t is clear that the weight of authority stands for the proposition that state law, in this instance, the law of Florida, controls the procedure for execution of judgments rendered in the federal district courts.” *See United States v. Fiorella*, 869 F.2d 1425 (11th Cir. 1989); *In re American Freight System, Inc.*, 173 B.R. 739 (Bankr. D. Kan. 1994); *In re Kilby*, 196 B.R. 627 (Bankr. M.D. Fla. 1996); *In re Miller*, 248 B.R. 198 (Bankr. M.D. Fla. 2000).

For further guidance, the bankruptcy court looked to 28 U.S.C. §1963 which provides in part:

A judgment in an action for the recovery of money or property entered in any district court . . . may be registered by filing a certified copy of such judgment in any other district . . . when the judgment has become final by appeal or expiration of the time for appeal.

This statute is somewhat unclear in that it states a party *may* register the judgment, and does not *require* a party to register the judgment in the district where the property is located.

Thus, the ultimate question becomes whether or not the writ, properly issued, was served in compliance with the due process requirements of the Constitution and the Rules of procedure governing service of process. Federal Rule of Bankruptcy Procedure 7004 provides for “Nationwide Service of Process.” Fed.R.Bankr.P. 7004(d). A writ of garnishment is “a process.” Accordingly, if a party serves the writ in accordance with Rule 7004, it cannot be dissolved. *See In re American Freight*, 173 B.R. 739; *In re Federal Fountain, Inc.*, 165 F.3d 600 (8th Cir. 1999). Based upon the foregoing, the bankruptcy court found the procedure implemented by the Chapter 7 Trustee to be correct. The writ of garnishment was valid.

Even though the bankruptcy court determined the process utilized by the Chapter 7 Trustee to be appropriate in this case, the court did state that it would ordinarily require the Chapter 7 Trustee to resort to the registration process.

THIRD CIRCUIT DENIES CREDITORS' COMMITTEE AUTHORITY TO BRING FRAUDULENT TRANSFER CLAIMS

By Edmund S. Whitson

Recently, the U.S. Third Circuit Court of Appeals, relying on the U.S. Supreme Court's opinion in *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000) (holding that only the debtor or trustee possessed standing under 11 U.S.C. § 506(c) to surcharge collateral), held that the Official Committee of Unsecured Creditors lacked authority to bring state law fraudulent transfer claims under 11 U.S.C. § 544(b). See *Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery*, _____ F.3d_____, 2002 WL 31102712 (3d Cir. (N.J.) September 20, 2002). Focusing on the identical language "the trustee may" predicated both Sections 506(c) and 544(b), the Third Circuit determined that the plain meaning limitations determined by the *Hartford Underwriters* court applied with equal force to the issue in *Cybergenics*. Because the Third Circuit is the first circuit court to issue such a holding in the wake of *Hartford Underwriters*, *Cybergenics* is potentially a far-reaching decision. While the holding and rationale of *Cybergenics* appear logically unassailable in light of the dictates of statutory construction expounded in *Hartford Underwriters*, the facts and procedural history of the case possibly inform a closer analysis.

Specifically, prior to the Committee's fraudulent transfer action, the debtor received bankruptcy court approval to sell all of its assets. The debtor consummated that sale and moved to dismiss its bankruptcy case. The Committee prevailed in its objection to dismissal based on its argument that the debtor's prepetition leveraged buy-out presented significant fraudulent transfer claims that should be preserved for the benefit of the estate.

Following the procedure recognized by the bankruptcy courts and other circuit courts, the Committee made demand on the debtor to bring the alleged fraudulent transfer claims but the debtor refused. Accordingly, the Committee sought and received "derivative standing" from the bankruptcy court to bring the fraudulent transfer claims.

After the Committee filed its complaint, the defendants moved to dismiss alleging that the fraudulent transfer claims at issue had been sold under the prior sale of all assets. The defendant's motion was granted but, on subsequent appeal, that ruling was reversed by the Third Circuit which held that state law fraudulent transfer claims belong to the creditors of the estate – not to the debtor – and could therefore not have been conveyed under the asset sale.

After remand, the defendants again moved to dismiss alleging (for the first time) that a "plain reading" of Section 544(b) precluded Committee standing in accordance with the holding of *Hartford Underwriters*. The district court agreed and the case again went up to the Third Circuit.

There, the *Cybergenics* court began its review by noting that, in *Hartford Underwriters*, the Supreme Court discussed this very derivative standing practice and

specifically declined to address that issue stating, *inter alia*, that "it has no application here." The *Cybergenics* court then discussed each of the Committee's attempts to distinguish *Hartford Underwriters* – rather than "engage" the Supreme Court's holding – on the grounds that this was a Chapter 11 case and Sections 1103(c)(5) and 1109(b) conferred standing on creditors' committees to bring such actions.

The *Cybergenics* court found the latter a particularly weak argument due to the fact that such expansive authority under those code sections was specifically rejected in *Hartford Underwriters*. The *Cybergenics* court further rejected the Committee's other attempts to distinguish *Hartford Underwriters* and rejected any appeal to concerns of public policy, holding that matters of policy lay within the purview of Congress and not the courts. Thus, viewing the language of Section 544(b) through what may be termed the "keyhole" of the plain meaning rule, *Cybergenics* held that authority to bring such actions was limited to the debtor or trustee and the bankruptcy court could not authorize such an arrangement.

In consolation, the *Cybergenics* court offered several potential alternatives to the Committee and other litigants including moving for the appointment of a trustee, dismissal of the case in order to pursue such claims in state court, or in cases involving a Chapter 11 plan – appointment of a representative to prosecute such claims under 11 U.S.C. § 1123(b)(3).

Notably, the *Cybergenics* committee has moved for rehearing *en banc*. Also, post-*Cybergenics*, the U.S. Second Circuit Court of Appeals has recently reaffirmed the derivative standing procedures invalidated by the Third Circuit. See *In re Housecraft Indus. USA, Inc.*, _____, F.3d_____, 2002 WL 31388883 (2d Cir. (Vt.) Oct. 24, 2002). The *Housecraft* decision is unlikely to have much, if any, precedential value in this regard given that it does not even mention *Cybergenics* or *Hartford Underwriters*. Further, *Housecraft* involved the joint prosecution between a chapter 7 trustee and a bank of fraudulent transfer claims pursuant to a court-approved agreement.

Thus, the issue of non-debtor authority to pursue avoidance actions remains very live, topical and unsettled. Until resolved – presumably by legislative amendment – the case provides ample fodder for legal debate. In any event, *Cybergenics*, should the present ruling stand, presents significant issues concerning choice of venue and case strategy, as well as other implications raised by *Hartford Underwriters*.

LATEST NEWS

Most recently -- and perhaps of some portent to the future of *Cybergenics* -- the Third Circuit *en banc* issued an Order on November 18, 2002, vacating the panel opinion pending rehearing *en banc* at the convenience of the Court.

Remembering Douglas P. McClurg

by Michael P. Brundage

This past month, the Tampa Bay Bankruptcy Bar Association lost one of its top lawyers and original founding members. On November 10, 2002, Douglas P. McClurg was killed in a tragic hunting accident. Doug's commitment to his profession, his community, his family and his friends are the hallmarks of his legacy.

By the age of 20, Doug completed a distinguished combat tour in Vietnam, earning the Combat Infantry Medal, the Air Medal, the Bronze Star and a Purple Heart. After serving his country, Doug attended the University of Florida, earning a bachelor's degree in Political Science and American History (with high honors) and a juris doctorate (with honors). Doug began his legal career in Jacksonville, Florida in 1976 where he quickly rose to the top of the ranks of Florida's bankruptcy lawyers. In December 1984, Doug moved to Tampa and joined Holland & Knight as the head of its bankruptcy and creditors' rights practice area. In 1987, along with Don Stichter, Leonard Gilbert, Harley Riedel, Dick Prosser, Bob Glenn and Bill Zewadski, Doug helped establish the Tampa Bay Bankruptcy Bar Association. The association is recognized today as the premier bar association for bankruptcy lawyers in the State of Florida with a current membership of over 260 attorneys.



In 1992, Doug joined the firm of Hill, Ward & Henderson, P.A. For the past ten years Doug served as the head of Hill Ward's creditors' rights and bankruptcy group. Doug also served as the hiring partner for the firm overseeing its growth to its current size of 59 attorneys and over 85 support staff.

Over the past two decades, Doug has served as a past president and chairman of the Tampa Bay Bankruptcy Bar Association, Trustee of the Tampa Museum of Art, Trustee of the University of Florida Law Center Association, past President of The Tampa Club, Chairman of the Board of Young Life, and Director of the Gulf Ridge Council of the Boy Scouts of America. Doug was an avid outdoorsman, spending his free weekends boating, hunting, and backpacking, always with family and friends. Doug was a respected attorney, a compassionate adversary, a natural mentor, a friend and a loving husband and father. Doug is survived by his wife, Erika, and his three children, Kelly, Douglas, Jr., and Lauren.

Donations can be made in memory of Doug to the Gulf Ridge Council, Boy Scouts of America, 4410 Boy Scout Blvd., Tampa, Florida 33607 (telephone 872-2691) or to Young Life of Tampa, 3501 San Jose, Tampa, Florida 33629 (telephone 253-0674).

To learn more about Doug, you may visit a website created in his memory at www.douglaspmcclurg.com.

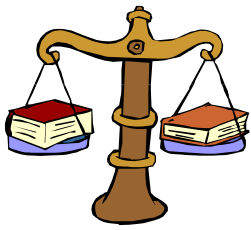
EXCEL ABC'S with Judge Michael G. Williamson

As previously announced at the October Tampa Bay Bankruptcy Bar luncheon, Judge Michael G. Williamson will be teaching the basics of *Excel* to those with little or no experience in the use of Microsoft's versatile spreadsheet program. This workshop may also be of use to those with some experience who need some gaps filled with regard to some of the basics.

The workshop will be held in the United States Bankruptcy Court, Eighth Floor, Computer Training Room from 3:00 - 4:00 p.m. on the following dates:

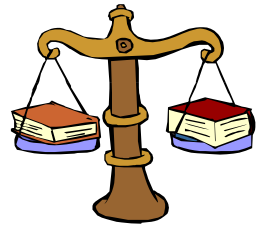
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Friday, December 20, 2002
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Friday, January 24, 2003

Please email Mary Maddox, Judge Williamson's Judicial Assistant at marym@flmb.uscourts.gov with your date preferences.



CASE LAW UPDATE II

by Cassandra N. Culley



Deborah Menotte v. Jan McLean Brown (*In re Brown*), 303 F.3d 1261 (11th Cir. 2002)

Although a trustee-debtor's right to income for life from a self-settled spendthrift trust is property of the estate, the trust corpus remains protected from the reach of creditors.

In *Brown*, the debtor, an alcoholic, placed a large inheritance into an irrevocable trust that would pay her a fixed monthly income for life. Upon the debtor's death, the yearly income payments passed to her daughter for life. Upon the daughter's death, the trust passed to several charities. Although the debtor served as trustee, she lacked the right to invade the trust corpus or alter the amount of payments made to the trust beneficiaries. The trust's spendthrift provision prevented the debtor, or any other beneficiary, from alienating or assigning their interest or rights in the trust.

Six years after creating the trust, the debtor filed for relief under chapter 7 of the Bankruptcy Code. In her schedules, the debtor listed her right to a monthly income distribution from the trust as exempt from administration. In support of her claim of exemption, the debtor argued that the spendthrift provision put the trust beyond the reach of her creditors and that the trust qualified as a support trust. The chapter 7 trustee objected on the basis that regardless of the trust's spendthrift provisions or supportive nature, a self-settled trust is not exempt from administration. The bankruptcy court overruled the trustee's objections and held that the spendthrift provision was valid. Furthermore, the bankruptcy court found that the trust qualified as an exempt support trust because the trust provided for the debtor's needs. The district court affirmed the bankruptcy court's decision.

On appeal, the Eleventh Circuit affirmed in part and reversed in part, holding that the trust's spendthrift provision did not protect the debtor's right to receive income for life from administration. However, the trust corpus was not property of the estate because the debtor could not assert dominion over the remainder corpus of the trust. Furthermore, the trust failed to qualify as a support trust under applicable Florida law due to its self-settled nature.

In *Brown*, the Court of Appeals noted that under Florida law, trusts containing spendthrift provisions are generally protected from the reach of creditors as long as

beneficiaries cannot exercise dominion over trust assets. In contrast, in instances where a settlor creates a trust for her own benefit and inserts a spendthrift provision, the trust comes within the reach of creditors.

In *Brown*, although the debtor was also the trustee, she lacked the power to invade the trust corpus or modify the trust's remainder interests. Accordingly, the Court held that since the debtor trustee only exercised control over income for life from the trust, her creditors were limited to attaching her right to income for life.

As a result of *Brown*, in instances where a debtor reserves a limited interest in a self-settled spendthrift trust, the limited interest may be attached by creditors while the corpus of the trust is protected.



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Please send this form and a check in the amount of **\$60.00** for dues from July 1, 2002 through June 30, 2003 to: **Tampa Bay Bankruptcy Bar Association, c/o David J. Tong, P.O. Box 3399, Tampa, FL 33601.**

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***Dennis LeVine** recently received the “My Boss is a Patriot” award, which is given to employers of National Guard and Reservists based on information submitted by the individual military member. Way to go Dennis!*

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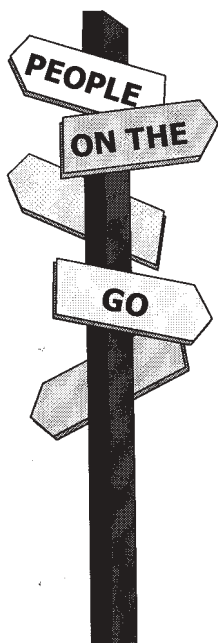
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The law office of **Ashley M. Myers, P.A.** has relocated to 4230 South MacDill, Suite 230, Tampa, Florida 33611.

Alfred A. Colby, formerly of **Akerman Senterfitt**, announces the opening of **Alfred A. Colby, P.A.** located at 625 East Twiggs Street, Suite 102, Tampa, Florida 33602, focusing on business and corporate transactions with emphasis on technology issues.

Walter L. Sanders has become associated with **Dennis LeVine & Associates, P.A.**, with offices at 103 South Boulevard, Tampa, Florida 33606, telephone (813) 253-0777. He concentrates in the areas of creditors rights and bankruptcy.

David Steen, P.A. opened its office at 602 S. Boulevard, Tampa, FL 33606. Mr. Steen is joined by **David Schrader, Esq.**

Catherine Norton Berman of Berman & Norton Berman, and her husband welcomed a baby boy, Marcus, on September 12, 2002.

Berman & Norton Berman, P.A. announced the addition of two new associates, **Susan J. Gunn** and **Sacha Ross**. Ms. Gunn graduated from the University of Florida Levin College of Law in 2000. While there, she completed course work for a Certificate in Environmental and Land Use Law. Ms. Gunn graduated from the University of South Florida in 1989 with a B.A. in Mass Communications and Masters Degree course work in English Education. Ms. Ross graduated *cum laude* from Stetson University College of Law in 2001. While at Stetson, she received the Best Brief Award in the Gabrielli National Family Law Competition and served as Assistant Coach and Briefwriter for a moot court team. After graduation she worked with Dr. Paul Samuelson, Nobel Prize winner for Economics and his MIT legal counsel.

Please contact Ryan Chandler with any news concerning TBBBA members at (813) 224-9255 or rchandler@bushross.com.



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